



BRB No. 19-0492 BLA
Case No. 2014-BLA-05646

DEE ANN NOECKER)	
(o/b/o TOMMY V. NOECKER))	
)	
Claimant-Respondent)	
)	
v.)	
)	
DECKER COAL COMPANY)	
)	DATE ISSUED: 10/13/2021
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	ORDER on MOTION for
)	RECONSIDERATION
Party-in-Interest)	EN BANC

Employer has filed a timely motion for reconsideration en banc of the Benefits Review Board’s Decision and Order affirming the administrative law judge’s (ALJ) award of benefits in this case, *Noecker v. Decker Coal Co.*, BRB No. 19-0492 BLA (Dec. 15, 2020) (unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407(a), (d). Claimant responds in support of the Board’s decision.

In seeking reconsideration, Employer again challenges the constitutionality of the removal protections afforded Department of Labor ALJs. Motion for Reconsideration at 2-12. Employer generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional. *Id.* This argument has no merit. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has addressed this precise issue and has upheld the statute’s constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-38 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

After consideration of Employer's contentions and review of the Board's disposition of this case, no member of the Board voted to grant Employer's motion. Consequently, Employer's motion for reconsideration en banc is denied. 20 C.F.R. §§801.301(b), (c), 802.407(b), (d), 802.409.

By Order of the Board:

Thomas O. Shepherd, Jr.
Clerk of the Appellate Boards